Supreme Court, U. S.
FILED
MAY 30 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1343

UNITED STATES OF AMERICA,
Respondent,

v.

CHARLES C. DIGGS, JR.,
Petitioner.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITIONER'S REPLY MEMORANDUM

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1. Petitioner asserts that the courts below usurped the function of the legislative branch in determining that the internal rules of the House of Representatives prohibit using clerk-hire funds to reimburse congressional employees for official expenses. This interpretation of the House rules was a predicate for Petitioner's conviction.

As the Clerk of the U.S. House of Representatives has warned in describing this case:

> While the prosecution charged and the jury convicted defendant for compensating congressional employees to pay official expenses, the House proceeding did not result in any finding that payment of official expenses by compensating employees to pay such expenses violated applicable standards governing clerk-hire. . . .

> Accordingly, there are apparently two conflicting standards applicable to the conduct of Members of Congress, placing them at their risk in determining their appropriate course of action. This dichotomy creates uncertainty in the administrative process but also may inhibit the vigorous discharge of official and legislative functions by Members.[1]

Respondent does not dispute that it would have been inappropriate for a federal court to use criminal sanctions to enforce House rules. Rather, Respondent asserts that no construction or application of House rules was necessary to Petitioner's conviction.

The response argues that the gravamen of Petitioner's offense was that funds appropriated for congressional staff salaries were used for another purpose, despite Petitioner's representations to the House Office of Finance that these funds would be used only as employee salaries. (Resp. at 14 n.10 and 15). The point the response misses entirely is that Petitioner never represented to the House Office of Finance that his clerk-hire funds would be used solely for salaries; nor did the prosecution ever prove that clerk-hire funds could only be used for salaries, an issue determined by the House rules.

The question of whether clerk-hire funds, as described in the Payroll Authorization Forms filed by Petitioner with the House Finance Office, could be used to compensate employees for official expenses was the basic issue which had to be decided by the trial court and then by the Court of Appeals. If clerk-hire funds were available for this purpose, then Congressman Diggs did not engage in any fraudulent scheme in so using these funds. Moreover, since the Payroll Authorization Form authorizing disbursement of clerk-hire funds did not request information as to their intended use, other than the identity of the intended recipient, Petitioner would have made no false representations to the House Office of Finance in requesting the disbursement of clerk-hire funds without designating what portion was to be used as a salary and what portion was to be used as compensation for incurred expenses. The Court of Appeals understood that this threshold issue had to be decided before any other issue in the case could be reached. (Resp. at 10). If the House rules were not violated, there was no violation of a standard of conduct to support Petitioner's conviction.

[1] Attachment to Supplemental Petition for Rehearing with suggestion for Rehearing En Banc, filed December 17, 1979.

As the response notes, "the Chief of [the House Office of Finance] testified that the clerk-hire allowance is used to pay 'compensation to employees for their performance of official duties.'" (Resp. at 7). However, the Chief of the Finance Office never testified that clerk-hire funds could only be used as salary. In fact, at one point in the trial, under the most pointed questioning by the prosecutor, this House officer explained that House regulations were *silent* as to whether clerk-hire funds could be used for compensatory purposes other than salary, such as reimbursement for official expenses. (Pet. at 14).

The Respondent supports its contention that a construction of the House rules was unnecessary to a decision in this case with the fact that "the indictment did not even mention the violation of House rules regarding the use of clerk-hire funds." (Resp. at 12 n.8). A reading of Petitioner's brief in the Court of Appeals amply demonstrates the inaccuracy of this representation. As explained therein, the prosecution's bill of particulars *identified the normative standard of conduct violated by Congressman Diggs as "House Rules on Ethics and the common understanding of the purposes for and limitations of the Congressman's clerk-hire allowance."* (App. Brief at 10). Similarly, in his closing argument, the prosecutor specifi-

cally referred to an advisory opinion from the House Ethics Committee as the basis for the jury to determine the legitimate purposes for which clerk-hire funds could be utilized. (Tr. Oct. 6, 1978 at 112).

The Respondent seeks to buttress its argument that an interpretation of the House rule was unnecessary to this case by relying on "petitioner's false certification on congressional office expense vouchers that payment for the claimed office expenses had not been received, [as showing] that he intentionally concealed his misapplication of clerk-hire funds from the House Finance Office." (Resp. at 14 n.10). A similar allegation was made before the Court of Appeals.

There is, however, no evidence in the record to support this allegation and no record citation provided by the Respondent as a basis for it. When this allegation was raised in the Court of Appeals, counsel for Petitioner strenuously protested that the government was trying a new case for the first time in that appellate forum which was never tried in the District Court. (Transcript of Oral Argument at 44-46). If the government has evidence that such additional false representations were made, they should indict for and try those crimes, not raise new allegations for the first time before the Court of Appeals and now before the Supreme Court.

2. In response to Petitioner's claim that he did not have fair notice that his alleged offenses were unlawful, the response asserts that there is "nothing vague or ambiguous about the criminal statutes that petitioner was accused of violating." (Resp. at 17). The response states that the appropriate standard, which provided adequate notice to the defendant to justify the imposition of severe criminal penalties was a standard of "moral uprightness . . . fundamental honesty, fair play and right dealing." (Resp. at 18).

In order for Petitioner to realize that he was incurring potential criminal liability by committing a fraudulent act, he would have had to have known that he was using the clerk-hire allowance for an improper purpose or that he was misrepresenting this intended use to the Office of Finance in seeking disbursement of those funds.

As is shown in the Petition for Certiorari, the House regulations governing the permissible uses of the clerk-hire funds were not nearly clear enough to justify the imposition of criminal sanctions. The judges in the Court of Appeals could not agree on the meaning of those regulations. The Chief of the House Office of Finance, who has the primary responsibility for administering the clerk-hire allowance, could not say that there was any basis for concluding that reimbursement for official expenses was not "compensation for the performance of official duties"—the intended purpose for the clerk-hire allowance. (Resp. at 13-16).

3. As Respondent explains:

> In light of its decision that the use of clerk-hire funds for congressional office expenses was unlawful, the court [of appeals] held that petitioner was not entitled to an instruction that the jury should acquit him if it found that he had a good faith belief that staff salary payments could properly be used to defray his district office expenses. (Resp. at 10-11).

Respondent now asserts that the trial judge's instruction on good faith was proper because it "was fully consistent with petitioner's defense." (Resp. at 23 n.15). According to the response, "Petitioner testified that he knew Matlock and Dukes [two congressional employees] were using part of their salaries to pay office expenses, but he steadfastly refused to state that he increased their salaries specifically for that purpose, and he also refused

to admit that he personally directed his employees to make such payments." (Resp. at 8-9) "Instead, he asserted that the employees' salaries were not increased for that purpose. . . ." (Resp. at 8).

The response goes on to explain that, because "petitioner refused to acknowledge any causal connection between the salary increases and the employees' payments of his [congressional] expenses" (Resp. at 20), the trial court was correct in charging that a good faith defense was not available if Petitioner intended any part of his employees' clerk-hire payments to be used as reimbursements for congressional expenses.

On the contrary, as Judge Leventhal observed, the Petitioner's good faith defense in this case was "virtually obliterated" by this instruction. The theme of the defense was that Petitioner had a good faith belief in his discretion to use his clerk-hire allowance to compensate his employees for paying official expenses. Throughout the trial, Petitioner spoke of *reimbursing* his employees for the expenses they incurred in carrying out their official duties.

Defense counsel, in his last series of questions to Petitioner, a climactic moment in the trial, asked the following questions:

> "Q. When you increased the salary of Mr. Matlock in which he paid office expenses and was reimbursed through his salary account, was it your intent at that time to violate any laws of the United States?
> A. Absolutely not."
> "Q. And when Mr. Dukes billed you for expenses he incurred in representing you both here and in Detroit and his salary was increased by you through Payroll Authorization Form, was it your intent to violate any laws of the United States?
> A. Absolutely not." (Tr. Oct. 4, 1978 at 128).

In his closing argument, defense counsel freely admitted that these congressional employees paid official expenses and were reimbursed in clerk-hire funds for those expenses:

> "[Dukes] billed out his salary . . . and whatever expenses he incurred and he sent the bill in and they paid them and they adjusted the salary up or down depending upon how much money they had available and how many of the congressman's bills they had to pay insofar as what he had incurred in furtherance of the duties in Washington." (Tr. Oct. 6, 1978 at 77).

At another point in the trial, Petitioner testified as follows:

> A. Mr. Matlock paid the office expenses . . . for the Detroit District Office.
> "Q. Was he reimbursed for those expenses through his salary?
> A. Yes sir, that's correct." (Tr. Oct. 4, 1978 at 118).
> "Q. Do you recall doubling Mr. Dukes' salary for what he was to have himself personally for his services to you as a Congressman?'
> A. I authorized the payment to Mr. Dukes in both instances and, you know, the reason for it could be related to any number of things. Maybe he had more expenses that month; I don't know.
> Q. Then it was related to expenses, was it not?
> A. I said he paid expenses. I said that. I have said that." (Tr. Oct. 5, 1978 at 92).

In spite of this history, Respondent now asserts that Petitioner "provides no record citations in support of its statement that petitioner's good faith belief in the propriety of paying congressional expenses out of the clerk-hire allowance was the defense 'consistently asserted by him.'" (Resp. at 21 n. 14) In fact, pages 14 and 15 of Petitioner's reply brief and pages 1 through 7 of Peti-

tioner's Petition for Rehearing in the Court of Appeals were devoted to record citations on this very issue.

The Respondent next asserts that "[e]ven if petitioner entertained such a belief, it did not entitle him to misrepresent to the House Office of Finance the purpose for which the clerk-hire funds were sought." (Resp. at 22 p. 14). However, until it is determined that clerk-hire funds could not have been used to reimburse employees for incurring official expenses, Petitioner cannot be said to have misrepresented the purpose for which the funds were sought. Once again, an interpretation of the House rules is involved. Petitioner sought disbursements on an official form, which does not require that the purpose for which the funds are to be used be specified, and he applied the funds to what he believed to be a legitimate and allowable end.

4. The response asserts that, even if the above-described instruction was improper, this Court should not act because concurrent sentences were imposed on all counts and the faulty instruction was only relevant to 13 of the 29 counts on which Petitioner was convicted. First, it is difficult to imagine that an instruction by the trial judge, in effect, mandating a jury finding that Petitioner had intentionally defrauded the government in thirteen instances would have no impact on the jury's view of the evidence on related charges. Second, the thirteen counts clearly impacted by the improper instruction cannot be ignored. Under existing law in the District of Columbia Circuit, the Petitioner's criminal conviction on these thirteen counts has a collateral estoppel effect on his defense to a pending government civil fraud suit based on the same series of transactions.

5. Finally, the response asserts that this Court should not consider Petitioner's Speech or Debate Clause claim because this issue was not raised in the Court of Ap-

peals. This issue was raised in the Court of Appeals in Petitioner's Petition for a Rehearing With Suggestion For Rehearing En Banc, filed on December 12, 1979.

Respectfully submitted,

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